



July 18, 2000

Mr. John Steiner
Division Chief
City of Austin
P O Box 1546
Austin, Texas 78767-1546

OR2000-2703

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 136812.

The City of Austin Police Department (the "department"), which you represent, received two requests for information from the same requestor. The first request seeks all information pertaining to the arrest and detention of a named individual on March 11, 2000.¹ The second request seeks "any and all documents regarding the internal affairs records" on a named police officer, and "any and all records regarding APD Incident #00-0710367." You have provided for our review information that is responsive to the first request, and that portion of the second request pertaining to incident number 00-0710367.² You assert that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.

¹The request specifies, among other things, "MDT (mobile data terminal) records" and "any and all photographs or video or audio recordings produced regarding the arrest and detention" of the named individual. You state that the department "no longer has the MDT (mobile data terminal) records." You also state that "[t]here were no photos, other than the mug shot, or videos taken." We note that the Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983).

²Incident number 00-0710367 is indicated to be the same incident as that involving the arrest and detention of the named individual on March 11, 2000. The submitted information consists of an incident report, two department "use of force" reports, a booking sheet, a mug shot, and copies of finger and palm prints. You do not represent that this information comprises a representative sample of the responsive information. See Gov't Code § 552.301(e)(1)(D). We therefore assume that the submitted information comprises the entirety of the information that is responsive to the first request and that portion of the second request pertaining to incident number 00-0710367. We note that this decision does not authorize the withholding of responsive information which has not been submitted to this office for review.

We first address that portion of the second request that seeks the “internal affairs records” on the named police officer. We note that you did not submit for our review any information that is responsive to this request, nor do you make any arguments against release of this information. See Gov’t Code § 552.301(e)(1)(A), (D). You state only that the “requestor was referred to the Director of the Civil Service Commission under Section 143.089(g), Local Government Code. See also *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App. - Austin 1993, writ denied).” We assume from these comments that neither you nor the department forwarded the second request to the Director of the Civil Service Commission.

Section 143.089(g) of the Local Government Code states:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department’s use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the [civil service] director or the director’s designee a person or agency that requests information that is maintained in the fire fighter’s or police officer’s personnel file.

The court in *City of San Antonio* interpreted section 143.089 in the context of a request for information under the Act and concluded that the above-cited subsection (g) makes confidential the information contained in the personnel file maintained by a department for its use.³ *City of San Antonio*, 851 S.W.2d at 949. The court therefore held that the information at issue in the case was excepted from disclosure by the statutory predecessor to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.⁴ *Id.*

We acknowledge that the above-cited language of section 143.089(g), in pertinent part, states that “[t]he department shall refer to the [civil service] director or the director’s designee a

³Section 143.089 contemplates up to two different types of personnel files, one that the city is required to maintain as part of the police officer’s civil service file (the “(a)” file), and one that the department may, but is not required to, maintain for its own internal use (the “(g)” file). Local Gov’t Code § 143.089(a), (g). The (a) file must contain certain specified items, including documents relating to any misconduct in those cases where the department took disciplinary action against the officer. *Id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the (a) file if the civil service commission determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *Id.* § 143.089(b), (c). Thus, subsections (a)-(c) limit the contents of the (a) file. Subsection (g) authorizes but does not require the department to maintain for its use a separate and independent, internal personnel file on a peace officer.

⁴Section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes.

person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file." However, we note that this language pertains to *any* request for the personnel file, and is thus not restricted to requests that are made under the Public Information Act (the "Act"). The Act designates the chief administrative officer of the city as the officer for public information, and makes each city department head an agent of that officer. See Gov't Code §§ 552.201, .202. The Act also provides that the officer for public information has the responsibility to "promptly produce public information." Gov't Code § 552.221. Thus, where a request for information under the Act includes responsive information that is subject to section 143.089, we do not believe that the public information officer or agent may rely on the above-cited language of section 143.089(g) as authority for refusing the request and referring the *requestor* to the civil service director or the director's designee. Rather, to the extent that section 143.089(g) of the Local Government Code conflicts with the duties that the Act imposes on a governmental body through its public information officer or agent, we believe that such conflict can be readily reconciled. See Gov't Code § 311.026(a). For example, rather than refusing the request and referring the *requestor* to the civil service director or the director's designee, the officer for public information or that officer's agent should refer the *request* to the civil service director.⁵ See Open Records Decision No. 650 at 2 (1996). Absent a previous determination from this office as to the precise information at issue, if the civil service director or designee seeks to withhold from the requestor information that is responsive to the request, the officer for public information or agent must ensure that the governmental body properly seeks a

⁵In considering whether the city had waived the opportunity to assert the statutory predecessor to section 552.101 of the Government Code because this exception not been asserted when the city earlier requested a decision of this office, the court in *City of San Antonio* opined that the city's failure to earlier assert the exception did not preclude the court from considering the exception. The court stated that in a proceeding under the Act where a decision is requested of this office "[t]he doctrines of waiver and estoppel have no place[.]" *City of San Antonio*, 851 S.W.2d at 950. The court additionally stated that the civil service director has "exclusive power to make disclosure decisions under the Act" for that information contained in personnel files that are subject to section 143.089. *Id.* at 949. It is due to the department's apparent reliance on the *City of San Antonio* case that the present *requestor* was referred to the Director of the Civil Service Commission. It is also in apparent reliance on this case that, to our knowledge, neither you nor the department further processed the *request* for the "internal affairs records." As explained above, we believe this reliance was misplaced. The apparent conflict between the requirements of section 143.089(g) and of the Act can be readily reconciled by referring the *request* to the Director of the Civil Service Commission. Moreover, since the *City of San Antonio* decision, the Act has been amended to effectively overrule the court's holding that "[t]he doctrines of waiver and estoppel have no place" in a proceeding under the Act. See Gov't Code § 552.326 (unless based on requirement of federal law or involving property or privacy interests of another person, the only exceptions a governmental body may raise in a suit filed under the Public Information Act are those exceptions that were properly raised before the attorney general); see also Gov't Code § 552.301(a) (for information that a governmental body considers to be within an exception, and if there has not been a previous determination, governmental body must ask for a decision from the attorney general). Although the *City of San Antonio* decision suggested that a governmental body had discretion to seek or not seek an attorney general decision under the Public Information Act in order to withhold requested information, the Act has since been amended to clarify that an attorney general decision must be sought in such instances.

decision of this office in compliance with section 552.301 of the Government Code.⁶ To the extent the department believes the information that is responsive to the request for "internal affairs records" constitutes information that is excepted from required disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code, the department is required to seek a decision from this office in compliance with the full requirements of section 552.301, including subsections 552.301(e)(1)(A), (D). As noted above, you did not properly comply with section 552.301 because you neither submitted the responsive information to this office nor did you submit written comments stating why the responsive information is excepted from required disclosure.⁷

Section 552.302 of the Government Code provides that if a governmental body does not request an attorney general decision as provided by section 552.301, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. A compelling reason exists where information is made confidential by some other source of law. *See* Open Records Decision Nos. 150 (1977), 26 (1974). Because you have not submitted the information or comments regarding the information, we have no basis for finding it confidential. Indeed, we are not informed of whether any information exists that is responsive to the request for "internal affairs records," and if so, whether any such information has been withheld from the requestor. Because this office was not provided sufficient information to make a determination as to the requested "internal affairs records," and because it is not clear that the department is seeking a decision from this office as to that information, this decision does not address any responsive information other than the documents that have been submitted for our review.⁸

Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). You inform us that the submitted information pertains to a matter in which prosecution is

⁶We have no indication that this office has issued a previous determination as to the precise information at issue that is responsive to the present request for the "internal affairs records." *See* Gov't Code § 552.301(f)(1) (governmental body prohibited from seeking a decision from attorney general where governmental body has previously requested and received a determination concerning the precise information at issue). Further, we believe that the *City of San Antonio* case constitutes a previous determination only as to the precise records that were at issue in that case.

⁷We also have no indication that the Director of the Civil Service Commission, or the director's designee, has complied with section 552.301.

⁸As stated above, the submitted information is responsive to the first request and that portion of the second request that pertains to incident number 00-0710367.

pending. We therefore believe that the release of this information “would interfere with the detection, investigation, or prosecution of crime.” *Id.*; see also *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). Thus, except as noted below, we conclude that the submitted documents may be withheld under section 552.108(a)(1).

Section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 (1976). Thus, with the exception of the basic front page offense and arrest information which must be released, you may withhold the submitted information from disclosure based on section 552.108(a)(1).⁹ We note that you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov’t Code § 552.007.

In summary, this decision does not address the request for the “internal affairs records” on the named police officer. As to the information you have submitted for our review, you may withhold this information pursuant to section 552.108, except you must release to the requestor the basic front page offense and arrest information.

Because section 552.108 is dispositive, we do not address the other exceptions you have asserted except as noted in footnote 9 above. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

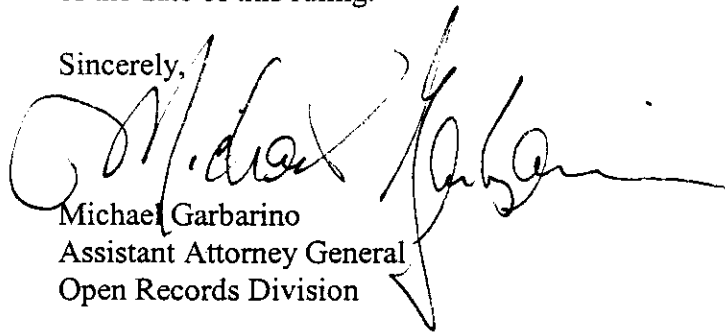
⁹Because we find that section 552.108(a)(1) is dispositive in regard to the information you have submitted, we do not address your section 552.103 assertion except to note that the basic information that is subject to release may not be withheld from public disclosure under section 552.103. Open Records Decision No. 362 (1983). You have additionally informed this office that the “first page” information has been released.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 136812

Encl. Submitted documents

cc: Mr. Jeffrey D. Miller
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(w/o enclosures)